

THE
CASE
OF THE

Right Honourable *Lucius Henry (Cary)* Viscount *Falkland*,
of the Kingdom of *Scotland*; one of the Respondents to
the Appeal of the Honourable *James Bertie* Esq; and *Elizabeth*
his Wife, Appellants.

The Will,
10th Sept.
1685.

THAT *John Cary*, Esq; being seized in Fee of a real Estate of 2000 pound per *Annum* and upwards,
On the 10th of Sept. 1685. made his last Will, and thereby revoking all former Wills, he gave and devised all his
Mannors, Lands, Hereditaments, and Estate whatsoever, (except some small part therein excepted) unto *John Grout*,
and *William Whitlock*, Esq; and their Heirs, for the performance and payment of some trust, and legacies therein
mentioned, and long since satisfied.

And after payment thereof, he did will and declare his mind to be, that the said *John Grout* and *William Whitlock*, and
their Heirs, should stand, and be seized and possessed of all the said Mannors, Lands, and Estate, (except as therein is excepted)
in trust for *Elizabeth Willoughby* his Cousin, (the now Appellant) sole Daughter and Heir of the late Lord Willoughby of Parham,
in case she should within three years, next after his (the said *John Cary*'s decease) be lawfully married, according to the liturgy
and practice of the Church of England, unto *Francis Lord Guildford*, eldest Son of the late Lord Keeper, for her life, and after her
death, in case such marriage should be had and take effect, in trust for her eldest Son, and all her Sons by the said *Francis Lord*
Guildford, to be begotten successively in special Taile Male.

And in default of such Issue, or in case the Marriage should not take effect within the said three years, then in either
cases, immediately from and after either the said contingencies happening.

In trust for *Anthony (Cary) Viscount Falkland* for his life, and after his death in trust for his first Son, and all other his Sons
successively, in taile male, and in default of such issue,

In trust for *Edward Cary* Esq; (the present Lord Falkland's Father) for his life, and after his decease, in trust for his first
Son, and all his Sons successively in taile male, the remainder over to the right Heirs of the said *John Cary*.

And devised all his Leasehold Estate to his said Trustees, in trust as the said Free hold Premises are devised, and
made the said *William Whitlock* Esq; and *Roger North* Esq; Executors of the said Will, and willed his Furniture
and Goods (except Plate) at Stanwell, in trust for the benefit of the persons that should enjoy his said real Estate, by virtue of his
Will, which Will is agreed on both sides.

That after making the said Will, the said *John Cary* added a Codicil, reciting the said trust, and appointments of his
said Estate, and thereby declared it to be his Will.

Codicil 20. That in case the Marriage should take effect before the ages of Consent of the said Parties, or either of them, then unless the
Sept. 1685. same should be confirmed by both at the ages of Consent, the said *Elizabeth* should have no benefit of the said appointments, other
than she should have had, in case the said Marriage had never been solemnized.

Note. It is not material in what manner *John Cary*, by any former Will, had given his Estate to Mrs. Bertie, because by this
last Will he hath expressly revoked and made void all former Wills and Declarations whatsoever.

Note. Also that *John Cary* inter-married, and had a great Fortune with the Lady *Bash*, (Aunt to the late Lord Keeper North)
and was thereby induced to make a return of this Match to the present Lord Guildford.

Oct. 8. 1685. The said *John Cary* dyeth, and the three years next after his death expire. (the Marriage not solemnized.)

Note. The Appellant *Elizabeth* was married before the Lord Guildford.

And in default of such Issue, or in case the Marriage should not take effect within the said three years, then in either cases, immediately from and after either the said contingencies happening.

In trust for Anthony (Cary) Viscount Falkland for his life, and after his death in trust for his first Son, and all other his Sons successively, in taile male, and in default of such issue,

In trust for Edward Cary Esq; (the present Lord Falkland's Father) for his life, and after his decease, in trust for his first Son, and all his Sons successively in taile male, the remainder over to the right Heirs of the said John Cary.

And devised all his Leasehold Estate to his said Trustees, in trust as the said Free hold Premises are devised, and made the said William Whitlock Esq; and Roger North Esq; Executors of the said Will, and willed his Furniture and Goods (except Plate) at Stanwell, in trust for the benefit of the persons that should enjoy his said real Estate, by virtue of his Will, which Will is agreed on both sides.

That after making the said Will, the said John Cary added a Codicil, reciting the said trust, and appointments of his said Estate, and thereby declared it to be his Will.

Codicil 20. Sept. 1685. That in case the Marriage should take effect before the ages of Consent of the said Parties, or either of them, then unless the same should be confirmed by both at the ages of Consent, the said Elizabeth should have no benefit of the said appointments, other than she should have had, in case the said Marriage had never been solemnized.

Note. It is not material in what manner John Cary, by any former Will, had given his Estate to Mrs. Bertie, because by this last Will he hath expressly revoked and made void all former Wills and Declarations whatsoever.

Note. Also that John Cary inter-married, and had a great Fortune with the Lady Bash, (Aunt to the late Lord Keeper North) and was thereby induced to make a return of this Match to the present Lord Guildford.

Oct. 8. 1685. The said John Cary dyeth, and the three years next after his death expire. (the Marriage not solemnized.)

Note. The Appellant Elizabeth was married before the Lord Guildford.

Aug. 1692. Edward Cary dyeth, leaving the Respondent his only Son and heir.

May 1694. And in May 1694. Anthony Viscount Falkland dyeth without issue male, whereby the Respondent (the present Lord Falkland) is intitled to the said Estate, according to the appointment and express limitation of the said Will.

land died. July 1687. That July 16. 1687. the said Lord Guildford, by his Guardians, did in writing signify to the Appellant Elizabeth, and her friends, that he had then lately attained the age of Consent, and was ready to consummate the Marriage; but then also the Appellant and her Friends a second time refused the Marriage, unless it might be upon such terms as they demanded, which were foreign, and not required by the said Will, and such as neither the said Lord Guildford, then in his Infancy, or his Guardians, could agree or perform.

The said Respondent insists that it is not material thro whose default the said Marriage was not had, since, by the express provision of the Will, the Appellant was not to have the Estate, in case the Marriage did not take effect; but in default thereof the Estate was to go over to the Lord Falkland.

That no man can tell what Will to make, or how to settle his Estate, by the last solemn act of his life, (if a Will, as this is) made advisedly plain in the expression, executed and done according to the Laws and Statutes for that purpose, shall by surmise (directly contrary to the express declaration of the Testator's intention or construction be subverted, and not only the present Lord Falkland, but all devisees of Estates will hereafter be precarious in the exposition of Wills, be they never so plain, and the intention as fully expressed as words can express it.

Wherefore the Respondent humbly hopes, that your Lordships will dismiss the Appeal, and Affirm the said Decree made by the Lord Chancellour, with the assistance and concurrence of the two Chief Justices, agreeable to the rules of Law and Equity.